IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS Plaintiff Vs. JODY A. PENN Defendant	CASE NO. ST-10-CR-0000179 ACTION FOR: 14 V.I.C. 922(a)(1); 14 V.I.C. 295(1); 14 V.I.C. 297(2); 14 V.I.C. 2253(a) - 3 COUNTS; 14 V.I.C. 625(a); 14 V.I.C. 2253(b)

NOTICE
OF
ENTRY OF JUDGMENT/ORDER

TO: J. RUSSELL B. PATE, Esquire
MICHAEL MOTYLINSKI, Esquire
SUPERIOR COURT JUDGES AND MAGISTRATES Esquire

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ORDER BOOK

Please take notice that on September 21, 2010 a Memorandum Opinion Order was entered by this Court in the above-entitled matter.

Dated: September 30, 2010

VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Superior Court

By: KHAILILA T. FRETT
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CASE NO. ST-10-CR-179**
	)	
JODY A. PENN,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Defendant moves to bar any in-court identification of Defendant by prosecution witness # 3 on the basis that the identification would be impermissively suggestive. In the alternative, Defendant moves to appoint an eye witness identification expert.[1] For the following reasons, Defendant's motion will be granted in part and denied in part.

ANALYSIS

An identification procedure that is "impermissibly suggestive" and creates "a substantial risk of misidentification" violates due process. *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977). Impermissible suggestiveness consists of two components: whether the circumstances surrounding the identification are suggestive and whether there is a good reason for not utilizing a procedure that is less suggestive. *United States v. Stevens*, 935 F.2d 1380, 1389 (3d Cir. 1991). A suggestive identification does not violate due process if it possesses "sufficient aspects of reliability." *Brathwaite*, *supra*, at 106. Pursuant to *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), courts look at the totality of

the circumstances and consider the following factors: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and confrontation."

Here, Defendant seeks to bar the identification of witness # 3 who may either be Mrs. Verna Venzen ("Venzen") or Mr. Maurice Donovan ("Donovan"). In a statement made to the Virgin Islands Police Department, Venzen indicated that she heard several gun shots, and then observed a black male running through a bushy area to a pink residence. Venzen stated that she also observed a young woman who she knows to reside in the pink residence signal to her that the shooter had run into her home. Donovan made a statement to police that he heard gunshots, saw a man with a rifle or machine gun chasing another man, and saw the man with the gun shoot the other man several times.

Based on the statements of the witnesses that the People intend to introduce at trial, the shooter in this case was under near continuous observation from the time of the shooting, first by Donovan, then by Venzen who saw him go to the pink residence, and finally by the occupant of the pink residence who observed him, more or less, until the time of his arrest. Under the totality of the circumstances, the near continuous observation of the shooter is the key and overarching consideration, when coupled with the fact that the resident of the pink building knew and interacted with the shooter in the past and on the day of the shooting. In addition, no identification has been made by

[1] Defendant filed his motion on July 27, 2010; the People of the Virgin Islands filed an Opposition on August 9, 2010; and Defendant filed a Reply on August 16, 2010.

Donovan or Venzen at this time, in which case it would be premature to deem any identification to be impermissively suggestive. Moreover, Defendant will have the ability to cross examine the People's witnesses before the jury. See *Simmons v. U.S.*, 390 U.S. 377, 384 (1968) (any danger of misidentification may be "substantially lessened by a course of cross-examination at trial"). Finally, the Court will grant Defendant's motion to appoint eye witness expert Solomon M. Fulero, Ph.D, J.D, and permit Defendant to expend three thousand dollars ($3,000.00) for that purpose. The Court notes that Dr. Solomon has served as an eye witness expert in other cases. See *U.S. v. Graves*, 465 F.Supp.2d 450, 455 (E.D. Pa. 2006) ("Dr. Fulero, who holds a Ph.D. in psychology and has written numerous papers on forensic psychology, is qualified with respect to the proffered expert testimony"). In addition, "expert testimony on the reliability of eyewitness identifications can assist the jury in reaching a correct decision and therefore may meet the helpfulness requirement of [Federal Rule of Evidence] 702." *U.S. v. Downing*, 753 F.2d 1224, 1231 (3d Cir.1985). Dr. Fulero may testify about the reliability of eyewitness testimony in general terms based on prior cases, but of course may not address the reliability of any specific identification in this case. See *State v. Clopten*, 223 P.3d 1103, 1114 (Utah 2009). An Order consistent with this Memorandum Opinion shall follow.

Dated: September 21, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ____/____/____

by: _____
Rosalie Griffith
Court Clerk Supervisor 9/24/10

CERTIFIED A TRUE COPY

Date: 9/30/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By: _____
Court Clerk